IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 76-282

DR. DON M. SMART, *Petitioner*,

v.

CLARENCE JONES, ET AL, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

S. L. LEWIS
5614 Richmond Street
Dallas, Texas 75206
214-823-2305

DON M. SMART
10611 Garland Road
Dallas, Texas 75218
214-328-5401

Counsel for Petitioner

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CASES

IN THE
SUPREME COURT OF THE UNITED STATES
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NO._____

DR. DON M. SMART, *Petitioner*,

v.

CLARENCE JONES, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Dr. Don M. Smart, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 15, 1976.

OPINION BELOW

The District Court granted the Respondents' motion for summary judgment on May 30, 1975. Petitioner's motion to set aside summary judgment and for a change of venue was denied on June 17, 1975. This was affirmed by the Fifth Circuit on April 15, 1976, and Petitioner's motion for rehearing en banc was denied on May 19, 1976.

JURISDICTION

Jurisdiction is found upon the Fifth and Fourteenth Amendments to the United States Constitution; Title 28 U.S.C. Sections 1331, 1343, 2201; and Title 42 U.S.C. Sections 1983, 1985 (2)(3), and 1986.

The judgment in the Court of Appeals for the Fifth Circuit was entered on April 15, 1976 and a timely petition for rehearing en banc was denied on May 19, 1976, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Does a Texas capias meet the Constitutional due process requirements of an arrest warrant?

2. Can a separate unrelated condemnation case, without an arrest, *Smart v. Texas Power & Light Company*, 525 F.2d 1209 (5th Cir. 1976), involving a portion of 550 acres in Collin County, Texas, in which the commissioners' award was made and drawn down two years before Texas Power & Light Company initiated the present proceeding, resolve any of the issues in this present case as to a portion of 35 acres in Dallas County, Texas, in which there was not even a commissioners' hearing and there was an arrest on alleged criminal charges.

3. Is it denial of due process and equal protection of the law for the Senior Federal District Court Judge, who had been employed by two of the respondents and was a law partner of one of the respondents to enter an order transferring this case from another docket to his own docket; for the Senior Federal District Court Judge to state at a conference that he was not holding a hearing and then entering an order holding he had held a hearing; and for the Senior Federal District Court Judge

to apply collateral estoppel or res judicata in the case of *Nancy G. Smart v. Clarence Jones et al*, when the trial judge of that case, Judge Sarah T. Hughes, ruled at the request of respondent John Tolle that the cause of action of Dr. Don M. Smart was not to enter the case of Nancy G. Smart?

4. Is judicial immunity a denial of due process and equal protection of the law pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

Petitioner, Dr. Don M. Smart, is a duly licensed physician and duly licensed attorney, who was the victim of multiple criminal acts by Respondents, Dallas County Deputy Sheriffs, who trespassed onto his private homestead property, imprisoned him on his private property, assaulted him on his private property, assulted him on a public highway, and broke into his private medical office. All these acts occurred prior to obtaining a capias for arrest on alleged criminal acts. After obtaining a capias Respondents broke into his private medical office and forcibly took Dr. Smart to jail without a warrant although he was doing nothing more at the time than seeing medical patients. He was illegally placed in jail, mug shot, fingerprinted, deprived of his liberty, a criminal arrest record made, and falsely accused of criminal acts with the aid and abetment of the Dallas County District Attorney's office. All the foregoing occurred in order to deliver to Dr. Smart a void notice of condemnation valuation hearing that had expired and to which he was not legally bound to respond and was illegally initiated by Texas Power & Light Company.

This is a fight by an individual physician-attorney, who knows his rights, to protect his private property and personal rights

and sought to enjoy them, and to hold public officials accountable for illegally depriving him of his liberty. This one individual has taken on a huge corporation who pays Dallas County Deputy Sheriffs to deliver their notices of condemnation, which is not an official duty of the Sheriff or a civil process, in order to intimidate and coerce private landowners.

The basis of this whole proceeding was the initiation of a condemnation proceeding by J. F. Skelton, president of Texas Power & Light Company, who in 1972 without authority of a corporate resolution ordered the condemnation of Dr. Smart's property. The proceeding was void, *Burch v. City of San Antonio,* 518 S.W.2d 540 (Tex.Sup.Ct. 1975). Robert E. Burns, the company's attorney, sent this notice to the Dallas County Sheriff's department to deliver although it is not their official duty, *Texas Attorney General's Opinion* (No. C-164, October 1963), which specifically informed the Dallas County District Attorney this was not an official act for the Sheriff's department. The Sheriff's department treated this as an official duty and act and trespassed on Dr. Smart's property and assaulted him in order to deliver this notice although Mr. O'Byrne Cox, Respondent Grandstaff's superior, stated Grandstaff had no business being on Dr. Smart's property if he did not have a civil process to serve. The Respondents did not offer any defense whatsoever to Grandstaff trespassing onto Dr. Smart's homestead, blocking his lane, assaulting him by following his car in a dangerous and threatening manner, breaking into his office without either a search, arrest warrant or capias and threatening his employees. The age-old police trick of contriving a crime to deliver a paper was initiated and executed with the help of the Dallas County District Attorney's office.

The Dallas County District Attorney's office after consultation with their clients in the Sheriff's department, in which existed a client and attorney relationship, charged Dr. Smart with aggravated assault which was not of substance or merit whatsoever, and they dismissed this charge after some nine months. District Attorney Henry Wade and Assistant District Attorney John Tolle refused to submit to depositions by Dr. Smart in trial court and ignored the motions to compel them to appear. The chief civil litigator of the Dallas County District Attorney's office, John B. Tolle, took over the prosecution of Dr. Smart in the criminal case while at the same time defending his clients against Petitioner's civil rights suit.

This political "hot potato" case was before two federal judges when the Chief Judge in Northern District of Texas finally by his own order (Tr. p.171) transferred the case to himself and disposed of it by summary judgment pursuant to Fed. R. Civ. P. 56 while stating at a pretrial conference he was not holding a hearing. During the proceedings in chamber Dr. Smart protested at all times as to the accuracy of Respondents' representations by their attorneys, but this was ignored and the summary judgment recited there were not any material facts in controversy although the Respondents refused to answer some 212 admissions, refused to give depositions, and filed general denials to Dr. Smart's 35 page complaint. The trial court acted entirely on the "hearsay" statements of Respondents' attorneys and granted the summary judgment of Respondents based upon the case of *Nancy G. Smart v. Jones, et al,* Cause No. CA-3-64?3-B, aff. 493 F.2d 663, Cert. den. 420 U. S. 939 95 Sup. Ct. 1151, 43 L. Ed. 2d.417 (1975). The trial court ignored the fact that in the case of *Nancy G. Smart* trial judge Sarah T. Hughes specifically ruled that the case of *Don M. Smart* was

not to enter that case and no jury issues were presented as to the cause of action of Petitioner and this was done specifically at the request of Respondent John Tolle, and recited there was no issue or material fact although Dr. Smart's request for a discovery were ignored as were his multiple motions, which is not surprising in view of the relationship of the parties.

This is simply another case of abuse of power by public officials but not of the Watergate type public interest in order to provoke careful judicial scrutiny. For example, the recitation by the Fifth Circuit of *Smart Vs. Texas Power & Light Company*, 525 F.2d 1209 (Fifth Circuit 1976) involved a portion of 550 acres of land in Collin County, Texas, on which Dr. Smart drew down the commissioners' condemnation award in 1970 occurred without an arrest some two years before Texas Power & Light Company again initiated condemnation proceedings against a portion of his 35 acre homestead in Dallas County, Texas, in which there was not even a commissioners' hearing or an award and Dr. Smart was arrested to support a claim of jurisdiction. The cases are separated by two years, 515 acres, 35 miles and a commissioners' award and drawing down the award in Collin County and none in Dallas County and an arrest in Dallas and none in Collin County. The only similarity is the names of some of the parties involved as the issues were completely unrelated.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW ERRED IN HOLDING A TEXAS CAPIAS MEETS THE CONSTITUTIONAL DUE PROCESS REQUIREMENTS OF AN ARREST WARRANT.

The acts Dr. Smart is complaining of all occurred before the Deputy Sheriffs obtained a capias. The Fifth Circuit confused

the capias as being what Respondents claimed was a civil process. What Respondents claimed to be a civil process was a notice of a commissioners' hearing which was neither issued by a court or a magistrate and at the time of trespassing on Dr. Smart's property had already expired. Subsequent to their illegal acts the Dallas County Deputy Sheriffs sought to obtain a warrant of arrest from a magistrate and were refused. They then with the aid and abetment of the District Attorney's office obtained a capias which Respondents apparently became aware was not a warrant as their original answer of September 28, 1973 set forth "capias or warrant" (Tr. p. 44) and then omitted the word warrant in their first amended original answer filed October 5, 1973 (Tr. p. 61, par. 7). Respondents' exhibit of the capias (Tr. p. 66) showed on its face that it was issued by Tom Ellis, who is the Dallas County Clerk for all matters including marriage licenses and deed records, and it was rubber stamped by Clyde Sims, merely one of a large number of deputy clerks selected and employeed by the General Clerk, Tom Ellis, who is elected in a general election.

Respondent Grandstaff went to a magistrate to get a warrant for Dr. Smart without success. (Grandstaff deposition, December 7, 1972, page 58, in the case of *Nancy G. Smart v. Clarence Jones et al*, No. CA-3-6478-B).

The Texas Code of Criminal Procedure sets forth the requisites of a warrant:

> ARTICLE 15.01 Warrant of arrest
>
> A "warrant of arrest" is a written order from a magistrate, directed to a peace officer or some other person specially named, commanding him to take the body of the person accused of an offense, to be dealt with according to law.

ARTICLE 15.02 Requisites of warrant

It issues in the name of "The State of Texas", and shall be sufficient, without regard to form, if it have these substantial requisites:

1. It must specify the name of the person whose arrest is ordered, if it be known, if unknown, then some reasonably definite description must be given of him.

2. It must state that the person is accused of some offense against the laws of the State, naming the offense.

3. It must be signed by the magistrate, and his office be named in the body of the warrant, or in connection with his signature.

The Deputy Sheriffs refer to a capias as a "walk through" inasmuch as they just walk through papers and a clerk stamps the papers without the intervention of a magistrate. The Texas Code of Criminal Procedure sets forth the requisites of a capias:

ARTICLE 23.01 Definition of a "capias"

A "capias" is a writ issued by the court or clerk, directed "To any peace officer of the State of Texas", commanding him to arrest a person accused of an offense and bring him before that court immediately, or on a day or at a term stated in the writ.

ARTICLE 23.02 Its requisites

A capias shall be held sufficient if it have the following requisites:

1. That it run in the name of "The State of Texas";

2. That it name the person whose arrest is ordered, or if unknown, describe him;

3. That it specify the offense of which the defendant is accused, and it appear thereby that he is accused of some offense against the penal laws of the State;

4. That it name the court to which and the time when it is returnable; and

5. That it be dated and attested officially by the authority issuing the same.

This is an unlawful method used by the Dallas County District Attorney for the imposition of summary punishment when the District Attorney desires an arrest to be made and is unable to obtain the cooperation of a judge. The exercise by the District Attorney of an option to proceed by the warrant statute or to avoid the intervention of a magistrate to accomplish the arrest and incarceration of a citizen is a clear denial of Constitutional due process. The requirement of the intervention of a fair and impartial magistrate before the arrest and incarceration of a citizen at a subsequent time and far removed from the scene of the alleged crime is fundamental. The capias as used against the Petitioner, by Respondents, is a "by-pass" to avoid fundamental due process.

The requirements for the issue of search warrants and arrest warrants are the same, *Aguilar v. Texas*, 378 U.S. 108, 112 n3 (1964). The standard by which the validity of warrants are to be judged are the same whether federal or state officers are involved, *Ker v. California*, 374 U. S. 23 (1963). A subpoena issued by a District Attorney cannot qualify as a valid search warrant, *Mancusi v. DeForte*, 392 U.S. 364, 370-372 (1968).

The purpose of a Texas capias was to provide the means of arrest for an individual who had been previously before a magistrate and was not to take the place of an arrest warrant. The complaining witness, Deputy Sheriff Grandstaff, was also the person who obtained the capias and made the arrest so that he was aware of all the inherent defects and false allegations in the affidavit, information, and capias. The Respondents did not even comply with the mandate of the capias that Dr. Smart should be taken immediately before County Criminal Court

No. 2. Instead, he was placed in jail in order that they could obtain their purpose of imposing summary punishment without the intervention of a magistrate.

2. THE DECISION BELOW ERRED IN GRANTING A SUMMARY JUDGMENT FOR TEXAS POWER & LIGHT COMPANY BASED UPON *SMART V. TEXAS POWER & LIGHT COMPANY*, 525 F.2d 1209 (5th Cir. 1976) WHICH INVOLVED A PORTION OF 550 ACRES IN COLLIN COUNTY WITHOUT AN ARREST IN WHICH A CONDEMNATION AWARD WAS DRAWN DOWN BY DR. SMART IN 1970 WHILE THE PRESENT CASE WAS A PORTION OF HIS 35 ACRE HOMESTEAD IN DALLAS COUNTY, TEXAS, IN WHICH NO AWARD WAS EVEN MADE AND HE WAS ARRESTED.

The Fifth Circuit simply confused an unrelated case with the same style in which a commissioners' award was drawn down by Dr. Smart two years before condemnation in the present case was even initiated. The judgment rendered in favor of Texas Power & Light Company in the prior case was based upon a presumption of consent to the taking on the withdrawal of the commissioners' award. No arrest was involved in that case, while the present case involved a portion of 35 acres in Dallas County, Texas. Dr. Smart was arrested in order to attempt to intimidate him and confiscate his property. When Dr. Smart resisted, Texas Power & Light Company abandoned their attempt to condemn his property and withdrew their condemnation proceedings. The Fifth Circuit was simply confused because the unrelated cases were styled the same, but in reality the issues were completely different. There was a time difference of two years, a land difference of a portion of 515

acres and a distance separation of 35 miles, and no arrest vs. an arrest. In medical malpractice parlance the Fifth Circuit operated on the wrong patient.

3. THE DECISION BELOW ERRED IN DENYING PETITIONER DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS THE SENIOR FEDERAL DISTRICT COURT JUDGE CONFESSED IN HIS ORDER ENTERED ON JUNE 17, 1975 THAT HE HAD PREVIOUSLY BEEN EMPLOYED BY ONE OF THE DEFENDANTS, HAD BEEN A LAW ASSOCIATE OF ANOTHER DEFENDANT AND HAD BEEN EMPLOYED BY THE DALLAS COUNTY DISTRICT ATTORNEY'S OFFICE PREVIOUSLY, ENTERED AN ORDER TRANSFERRING THIS CASE TO HIS DOCKET AFTER IT HAD BEEN PENDING BEFORE OTHER FEDERAL JUDGES FOR TWO YEARS; STATED AT A CONFERENCE HE WAS NOT HOLDING A HEARING AND THEN ENTERED AN ORDER HOLDING THAT HE HAD HELD A HEARING; WHERE THE MOTION TO SUPPORT THE FINDINGS WERE FILED BY SOME RESPONDENTS 30 DAYS AND MORE FOLLOWING THE ORDER; AND ERRED IN APPLYING COLLATERAL ESTOPPEL OR RES JUDICATA IN THE CASE OF *NANCY G. SMART V. CLARENCE JONES ET AL* AS THE TRIAL JUDGE SARAH T. HUGHES IN THAT CASE HAD RULED AT THE REQUEST OF RESPONDENT JOHN TOLLE THAT THE CASE OF *DON M. SMART V. CLARENCE JONES* WAS NOT TO ENTER THE CASE OF *NANCY G. SMART V. CLARENCE JONES.*

It is one thing for a judge to have been employed by a Respondent at a prior time and quite another thing to couple this with an order transferring a case to his docket after it had been pending before other federal judges for two years.

In a conference before the trial judge on December 19, 1974, he specifically emphasized he was not having a hearing (Tr. Vol. II, p. 4, line 3). Petitioner is still waiting for a hearing as he has filed some seventeen motions which have never been heard or ruled on by the trial court.

None of the Respondents' answers even set forth collateral estoppel or res judicata as an affirmative defense as required by Rule 8(c) Fed. R. Civ. P. It was not within any of the exceptions provided for presenting defenses by motion pursuant to Rule 12(b) Fed. R. Civ. P.

In the trial of *Nancy Gayle Smart v. Clarence Jones et al*, No. CA-3-6478-B, trial Judge Sarah T. Hughes specifically stated the case of *Dr. Don M. Smart v. Clarence Jones et al*, No. Ca-3-7646-C would not be gone into (Tr. p 330). In that case the Petitioner was not a party, had no pleadings and at the conclusion no issues were presented to the jury for their determination, nor does the jury findings or judgment of the court contain any reference to the cause of action, which took place at a different time and place without any cogent circumstances in common. The Senior District Court Judge has ruled that the case of *Dr. Smart v. Clarence Jones* had been gone into in the *Nancy G. Smart* case although Judge Sarah T. Hughes had specifically held at the request of the Respondent Tolle that she was not going into the suit of Dr. Smart.

This "Alice in Wonderland" decision does not find a judge to be prejudicial when defendants before him were former employers and a law partner, that he was actually holding a hearing when he stated he was not holding a hearing, that collateral estoppel or res judicata would apply in a case in which the presiding judge had specifically ruled that no other case

was to enter the trial. Of course, this judicial juggling act confers benefits on public servants in Dallas County.

4. THE DECISION BELOW ERRED IN DISMISSING THE CAUSE OF ACTION AGAINST JUDGE JOHN ORVIS BASED UPON JUDICIAL IMMUNITY AS DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Judicial immunity is judge created for obvious reasons. Petitioner is a physician and attorney and as a physician is subject to malpractice actions based upon such artificial rules of law and evidence as informed consent, the statute of limitations does not begin to run until discovery, res ipsa loquitur on facts of medicine that are not common knowledge to laymen, and now subject to a new tort called outrage. In this age of consumerism Petitioner is a consumer of justice and no greater respect could be engendered for the judiciary than setting aside judge created immunity and taking a position in society as a responsible profession and be liable for their acts. Such trite answers as who would judge least he be judged is contrary to logic and the experience of other professions. The time has come to abolish such outdated self-serving legal principles. Judge Orvis had a duty to dismiss the criminal prosecution against Petitioner when it was unequivocally shown as a matter of law that Respondent Grandstaff did not have a civil process and he had a further duty to rescue Petitioner from criminal charges that had no substance as the District Attorney judicially confessed in his dismissal. It is only when the judiciary accepts responsibility for their own acts that we will have a conscientious effort to uphold the Constitution. This unequal protection of the law allows the

judiciary to escape liability for their negligence when other professions are facing expanding liabilities.

In the alternative it is not a judicial function to delegate judicial duties to a clerk in issuing a paper, capias, that is illegally being used as an arrest warrant. Judge Orvis had the power to prevent such ministerial shenanigans in order for the District Attorney to act as prosecutor and judge. It must be noted the Clerk is the employee of the County Clerk, a separately elected official. His official functions are in no manner judicial or that of magistrate.

It must be further noted the alleged judicial order of the capias demanded your Petitioner be taken before the judge "instanter". There is no showing the Respondents' total disregard of the order has occasioned any judicial reaction.

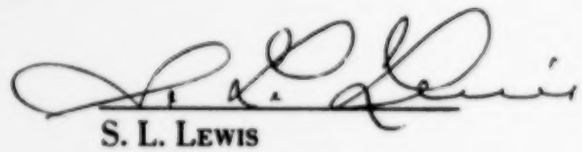
CONCLUSION

Dr. Smart was unlawfully arrested in his office while examing medical patients after a magistrate had turned down Respondents for an arrest warrant and with the help of the District Attorney they secured a capias in order to by-pass the magistrate. The Fifth Circuit Court mistakenly affirmed the dismissal of Texas Power & Light Company not realizing it was a separate, unrelated condemnation case involving Dr. Smart in which the commissioners' award was drawn down some two years before the present case was even initiated. The trial judge who had previously been employed by a Respondent and was a law partner of another Respondent, understandably would transfer this case to his docket in order to dispose of it. He entered an order which held a hearing had been had, although he stated specifically he was not holding a hearing, and overruled trial Judge

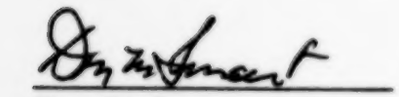
Sarah T. Hughes who had specifically set forth that the case of Dr. Don Smart was not to enter the case of Nancy G. Smart. The time is ripe for the judiciary to shed their judicial immunity and accept their professional responsibilities as all other professionals are so held. This case represents a flagrant abuse of power by public officials for the benefit of a gigantic corporation and public servants.

This case is of national significance on the institution of a procedure for arrest on a clerical order to "by-pass" the fundamental requirement no citizen shall lose their liberty and be incarcerated without the actual and conscious intervention and order of a judicial officer or magistrate, and that his name be signed to such an arrest and commitment order; therefore writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



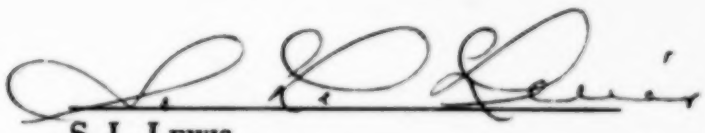
S. L. Lewis
5614 Richmond Street
Dallas, Texas 75206
214-823-2305



Don M. Smart
10611 Garland Road
Dallas, Texas 75218
214-328-5401

CERTIFICATE OF SERVICE

I, S. L. Lewis, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing petition for writ of certiorari on counsels for Respondents (three copies each), by depositing same in the United States mail, postage prepaid, on August 16, 1976, addressed to Frank Ryburn, Attorney for Texas Power & Light Company, 1522 Fidelity Union Life Building, Dallas, Texas 75201, and John B. Tolle, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas 75202, Earl Luna, Attorney at Law, 1002 Dallas Federal Savings Building, Dallas, Texas 75201, and Wayne Pearson, Attorney at Law, 1511 Fidelity Union Building, Dallas, Texas 75201, counsels of record for Respondents.



S. L. LEWIS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 76-282

DR. DON M. SMART, *Petitioner*,

v.

CLARENCE JONES, individually and as Sheriff
J. W. GRANDSTAFF, individually and as Deputy Sheriff
BENNY BARRETT, individually and as Deputy Sheriff
GAIL R. BARRETT, individually and as Deputy Sheriff
HENRY WADE, individually and as District Attorney
JOHN TOLLE, individually and as Assistant District Attorney
LEM BROTHERTON, individually and as
Assistant District Attorney
TEXAS POWER & LIGHT COMPANY, a Corporation
J. F. SKELTON, individually and as President of
TP&L Company
ROBERT E. BURNS, individually and as attorney for
TP&L Company
JUDGE JOHN J. ORVIS, individually and as
Judge of Dallas County,

Respondents

ADDENDUM OF EXHIBITS OF ORDERS AND JUDGMENTS OF THE DISTRICT COURT AND THE FIFTH CIRCUIT COURT OF APPEALS

S. L. LEWIS
5614 Richmond Street
Dallas, Texas 75206
214-823-2305

DON M. SMART
10611 Garland Road
Dallas, Texas 75218
214-328-5401

Counsel for Petitioner

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

DON M. SMART VS. CLARENCE JONES, ET AL	Civil Action No. CA 3-7646-E

ORDER

It is ORDERED that disposition of the motion to dismiss the complaint herein for failure to state a claim upon which relief can be granted, filed herein by the defendants WADE, TOLLE and BROTHERTON, is hereby postponed until trial on the merits or until further order of the Court.

Entered this 9 day of October, 1973.

Eldon B. Mahon

United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DR. DON M. SMART VS. CLARENCE JONES, Individually and as Sheriff of Dallas County, Texas, et al.	CIVIL ACTION NO. CA-3-7646-E

ORDER

Came on for consideration in the above-styled cause of action the motion for dismissal hereinbefore filed by Defendant John J. Orvis, and the Court, having considered the pleadings and the authorities advanced by counsel, concludes said motion should be and same is herewith GRANTED. *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

Entered this 11 day of February, 1974.

Eldon B. Mahon
United States District Judge

United States District Court

OFFICE OF THE CLERK
NORTHERN DISTRICT OF TEXAS
DALLAS, TEXAS 75202

JOSEPH McELROY, JR.
CLERK
ROOM 15 C 22
FEDERAL OFFICE BLDG.
1100 COMMERCE STREET

August 2, 1974

Dr. Don M. Smart
10611 Garland Road
Dallas, Texas 75218

Re: CA 3-7646-F — Dallas Division
Dr. Don M. Smart
vs. Clarence Jones, Ind. and as Sheriff, et al

Dear Dr. Smart:

This is to advise that the above styled and numbered cause has been assigned to the Honorable Robert W. Porter. As you will note, the letter "E" which formerly appeared at the end of the civil number has been changed to the letter "F" indicating the case is on Judge Porter's docket.

Sincerely yours,

JOSEPH McELROY, Jr., *Clerk*

By Harriette Fonville
Deputy

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DR. DON M. SMART
VS.
CLARENCE JONES, ET AL

CIVIL ACTION
NO. CA3-7646-

ORDER

IT IS ORDERED that the above styled and numbered cause be transferred to the undersigned Judge of this Court for all further proceedings.

Date: Aug. 6, 1974

W. M. Taylor, Jr.
United States District Judge

United States District Court
NORTHERN DISTRICT OF TEXAS
DALLAS 75202

W. M. TAYLOR, JR.
CHIEF JUDGE

May 28, 1975

TO COUNSEL OF RECORD:

RE: Dr. Don M. Smart v. Clarence Jones, et al. CA 3-7646-C

Gentlemen:

I have concluded that defendants' motion for summary judgment in the above case should be sustained. It appears that the Supreme Court has finally disposed of the case of *Nancy Gayle Smart v. Jones, et al*, and I am of the opinion that the principle of collateral estoppel is applicable in this case. Defendants' attorney, Mr. Tolle, is requested to prepare and submit appropriate order.

Yours very truly,

W. M. Taylor, Jr.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DON M. SMART
VS.
CLARENCE JONES, ET AL

CIVIL ACTION
NO. CA-3-7646-C

SUMMARY JUDGMENT

The motions for summary judgment filed in this cause by the defendants CLARENCE JONES, J. W. GRANDSTAFF, BENNY BARRETT, GAIL R. BARRETT, HENRY WADE, JOHN TOLLE, LEM BROTHERTON, TEXAS POWER & LIGHT CO., INC., J. F. SKELTON and ROBERT E. BURNS having come on for consideration, and the Court having examined the pleadings, depositions, briefs and all other papers on file herein, and the Court further having taken judicial notice of and having carefully reviewed the records of this Court in the case of *Nancy Gayle Smart v. Jones, et al,* cause no. CA-3-6478-B, affirmed 493 F.2d 663, rehearing denied 495 F.2d 1372, cert. den. ____US____, 95 S.Ct. 681, 42 L. Ed.2d 682, rehearing den. ____US____, 95 S.Ct. 1151, 43 L.Ed.2d 417 (1975), and having heard the arguments of counsel, and being of the opinion that there is no issue of material fact presented and that the said defendants are entitled to judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the motions for summary judgment filed by the above

named defendants be, and the same are, hereby granted, that plaintiff take nothing from the said defendants, that the action against all of the said defendants be dismissed on the merits, and that the said defendants recover of the plaintiff, DON M. SMART, their costs of action.

Signed and entered this 30th day of May, 1975.

W. M. TAYLOR, JR.
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DON M. SMART
vs.
CLARENCE JONES, ET AL } CA 3-7646-C

ORDER

Came on for consideration plaintiff's motion to set aside summary judgment and for change of venue. Such motion is not only wholly without merit but scurrilous as well. The judge of this court when in private practice was associated with the firm of Burford, Ryburn, Hincks and Charlton, now known as Burford, Ryburn and Ford, which now represents defendant Texas Power and Light Company and also represented that company at the time this judge was associated with it. That association with that firm was dissolved and terminated in October, 1946, twenty-nine years ago. Attorney defendant Robert E. Burns was in 1946 associated with that firm and the judge of this court has not since 1946 been associated with Mr. Burns as associate or law partner. Further, the judge of this court before becoming a judge was an asistant district attorney in the Dallas County District Attorney's office from January, 1933 until September 1, 1936, and since that date has not been employed by nor in any manner connected with the Dallas County District Attorney's office. There is no conflict of

interest and to so suggest is not only scurrilous and offensive but also frivolous.

Accordingly, plaintiff's motion to set aside summary judgment entered on May 30, 1975, and for change of venue is denied.

W. M. TAYLOR, JR.
United States District Judge

June 17, 1975

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DON M. SMART
vs.
CLARENCE JONES, ET AL } CA 3-7646-C

ORDER

Came on to be considered Plaintiff's Request for Findings of Fact and Conclusions of Law in the above cause. Findings of Fact and Conclusions of Law are unnecessary on decisions of motions for summary judgment under Rule 56. Fed.R.Civ.P. 52(a). *Hindes v. United States*, 326 F.2d 150 (5th Cir. 1964).

Accordingly, Plaintiff's request for Findings of Fact and Conclusions of Law should be and it is hereby denied.

W. M. TAYLOR, JR.
United States District Judge

June 24, 1975

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DON M. SMART
VS.
CLARENCE JONES, ET AL

CIVIL ACTION
NO. CA-3-7646-C

JUDGMENT

Came on to be heard the Motion for Summary Judgment of Third-Party Defendant Fidelity and Deposit Company of Maryland, and it appearing to the Court that said party occupied the status of a mere surety in said case, and that all principals for which Fidelity and Deposit was surety have been dismissed from this suit by the granting of their motions for summary judgment, thereby rendering moot the Third-Party Actions against Fidelity and Deposit Company of Maryland, and the Court is therefore of the opinion that said Motion of Fidelity and Deposit should be in all things granted;

It is, therefore, ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment of Third-Party Defendant Fidelity and Deposit Company of Maryland is granted, that the actions of Defendant Clarence Jones, J. W. Grandstaff, Benny Barrett and Gail Barrett against Third-Party Defendant be dismissed as moot, and that said Third-Party Defendant recover of Plaintiff Don Smart its costs of court.

SIGNED AND ENTERED this 26th day of June, 1975.

W. M. TAYLOR, JR.
United States District Judge

Dr. Don M. SMART, Plaintiff-Apellant,

v.

Clarence JONES, Individually and as Sheriff, et al., Etc., Defendants-Third Party Plaintiffs Appellees,

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Third Party Defendant.

No. 75-3096

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

April 15, 1976.

Civil rights action was brought alleging that defendants conspired to wrongfully condemn parcel of plaintiff's property and to falsely arrest, imprison and criminally prosecute him. The United States District Court for the Northern District of Texas, William M. Taylor, Jr., Chief Judge, granted defendants' motion for summary judgment, and plaintiff appealed. The Court of Appeals held that taking notice of plaintiff's wife's separate, unsuccessful civil rights action, which arose out of same set of circumstances, was proper as means of eliminating possible fact issues, that defendant county judge was cloaked with judical immunity, that defendant district attorney and his assistants acted solely within scope of their prosecutorial responsibilities and were therefore immune, that civil process served on plaintiff was neither improperly executed

* Rule 18, 5 Cir., *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

nor violative of due process, and that issues concerning condemnation had previously been resolved in favor of defendant power company.

Affirmed.

1. Federal Civil Procedure 2547

On defendants' motion for summary judgment in civil rights action, informal conference conducted in trial judge's chambers fully complied with rule pertaining to summary judgment, a formal evidentiary hearing prior to entry of summary judgment not being required. Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A.

2. Constitutional Law 211(1), 249(8), 253(1), 315

Neither fact that trial judge did not hold full evidentiary hearing in connection with defendants' motion for summary judgment in civil rights action nor fact that judge formerly practiced law with one defendant and formerly worked for two others, associations which terminated 30 years prior to action, constituted denial of due process or equal protection. 28 U.S.C.A. § 144.

3. Federal Civil Procedure 2481

In civil rights action which alleged that defendants conspired to wrongfully condemn parcel of plaintiff's property and to falsely arrest, imprison and criminally prosecute him, taking notice of plaintiff's wife's separate, unsuccesful civil rights action, which arose out of same set of circumstances, was proper as means of eliminating possible fact issues.

4. Conspiracy 13

County judge, who was one of several defendants in civil

rights action which alleged that defendants conspired to wrongfully condemn parcel of plaintiff's property and to falsely arrest, imprison and criminally prosecute him, was properly cloaked with judicial immunity.

5. Conspiracy 13

District attorney and his assistants, who were defendants in civil rights action which alleged that defendants conspired to wrongfully condemn parcel of plaintiff's property and to falsely arrest, imprison and criminally prosecute him, acted solely within scope of their prosecutorial responsibilities and were therefore immune.

6. Process 52

Attempted service of civil process on plaintiff by county deputy sheriff was proper where capias, which is Texas equivalent of arrest warrant and is issued by court or clerk and directed to any Texas peace officer, was neither improperly executed nor violative of due process. Vernon's Ann.Tex.C.C.P. art. 23.01.

7. Federal Civil Procedure 2469

In civil rights action which alleged that defendants conspired to, inter alia, wrongfully condemn parcel of plaintiff's property, grant of summary judgment in favor of defendant power company and two of its officers was not error where all issues concerning condemnation had been resolved by prior decision in favor of power company.

Appeal from the United States District Court for the Northern District of Texas.

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

PER CURIAM:

Dr. Don M. Smart brought this Civil Rights action under 42 U.S.C.A. §§ 1983, 1985, 1986 against a county judge, the Dallas County Sheriff, three of his deputies, the District Attorney of Dallas County and two Assistant District Attorneys, and the Texas Power & Light Co., its president and its attorney. Plaintiff complained that defendants conspired to wrongfully condemn a parcel of his property, and to falsely arrest, imprison and criminally prosecute him. Taking notice of a similar action brought by plaintiff's wife which raised identical factual and legal issues, and grew out of the same incident, *Smart v. Jones*, 493 F.2d 663 (5th Cir.), *cert. denied*, 419 U.S. 1090, 95 S.Ct. 681, 42 L.Ed.2d 682, *rehearing denied*, 420 U.S. 939, 95 S.Ct. 1151, 43 L.Ed.2d 417 (1975), the district court granted defendants' motion for summary judgment. On this appeal plaintiff Smart raises several issues of error. Finding none to be of merit, and agreeing with the district court that the cause presents no genuine issue of material fact, *Tyler v. Vickery*, 517 F.2d 1089, 1093 (5th Cir. 1975), and that the defendants are entitled to judgment as a matter of law, Rule 56(c), F.R.Civ.P., we affirm.

[1] The informal conference conducted in Judge Taylor's chambers fully complies with Rule 56, F.R.Civ.P., a formal evidentiary hearing prior to entry of summary judgment not being required. *See Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 862 (5th Cir. 1970).

[2] There was no denial of due process and equal protection either on the grounds the trial judge did not hold a full evidentiary hearing or because the judge formerly practiced law with one defendant and formerly worked for two others, associations which terminated 30 years prior to the instant lawsuit. *See* 28 U.S.C.A. § 144.

[3] Taking notice of Mrs. Smart's separate, unsuccessful Civil Rights action against four of the defendants in this suit, arising out of the same set of circumstances, was proper for the district court as a means of eliminating possible fact issues.

The issues which plaintiff argues are still open and subject to jury resolution — including the questions of whether the deputy properly attempted to serve civil process and whether the plaintiff was guilty of reckless driving — are not, on our reading of the record, genuinely uncertain issues which would necessitate trial on the merits.

[4] The county judge, one of the several defendants, is properly cloaked with judicial immunity. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

[5] The District Attorney and his assistants acted solely within the scope of their prosecutorial responsibilities and are immune under the principles expressed by this Court and the Supreme Court. *See Imbler v. Pachtman*, ____U.S. ____, 96 S.Ct. 984, 46 L.Ed.2d ____, 44 U.S.L.W. 4250 (1976); *Pierson v. Ray, supra*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288; *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Guerrero v. Barlow*, 494, F.2d 1190 (5th Cir. 1974).

[6] There is no merit to the issues which imply that

Deputy Grandstaff initiated this entire altercation by attempting to serve invalid civil process on the plaintiff. The capias, Texas' equivalent to an arrest warrant which is "issued by the court or clerk and directed 'To any peace officer of the State of Texas'" Art. 23.01, Tex.C.Crim.P., was neither improperly executed, nor violative of due process.

[7] Finally, Smart alleged error in the grant of summary judgment for defendants Texas Power & Light Co. and two of its officers. In essence, Smart argues that the corporation acted illegally in bringing condemnation proceedings against his property. This Court has resolved all issues concerning the condemnation in favor of the Texas Power & Light Co. *Smart v. Texas Power & Light Co.*, 525 F.2d 1209 (5th Cir. 1976) (1976).

AFFIRMED.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
EDWARD W. WADSWORTH
CLERK

TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

May 19, 1976

TO ALL COUNSEL OF RECORD

No. 75-3096 — Dr. Don M. Smart v. Clarence Jones, Etc., ET AL., Etc. v. Fidelity & Deposit Company of Maryland

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

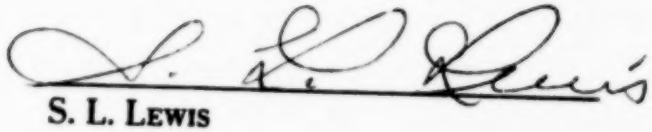
Very truly yours,
EDWARD W. WADSWORTH, *Clerk*

By Susan M. Gravors
Deputy Clerk

/smg
cc: Messrs. Don M. Smart
S. L. Lewis
Messrs. Earl Luna
Thomas V. Murto, III
Mr. John B. Tolle

CERTIFICATE OF SERVICE

I, S. L. Lewis, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Addendum of Exhibits on counsels for Respondents (three copies each), by depositing same in the United States mail, postage prepaid, on August 23, 1976, addressed to Frank Ryburn, Attorney for Texas Power & Light Company, 1522 Fidelity Union Life Building, Dallas, Texas 75201, and John B. Tolle, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas 75202, Earl Luna, Attorney at Law, 1002 Dallas Federal Savings Building, Dallas, Texas 75201, and Wayne Pearson, Attorney at Law, 1511 Fidelity Union Building, Dallas, Texas 75201, counsels of record for Respondents.



S. L. LEWIS

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-282

DR. DON M. SMART,

Petitioner,

v.

CLARENCE JONES, et al,

Respondents.

BRIEF OF TEXAS POWER & LIGHT COMPANY, ET AL., RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK M. RYBURN, JR.
1511 Fidelity Union Life Bldg.
Dallas, Texas 75201
214/741-5811

Counsel for Respondents Texas Power & Light Company, J. F. Skelton and Robert E. Burns

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

SUBJECT INDEX

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

DR. DON M. SMART, *Petitioner,*

v.

CLARENCE JONES, et al, *Respondents.*

BRIEF OF TEXAS POWER & LIGHT COMPANY, ET AL., RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents pray this Honorable Court to deny the Petition for a Writ of Certiorari for the reason that the judgment below is correct, just, and supported by an unbroken legion of decided cases in point, including cases heretofore decided by this Honorable Court.

PREFACE

The Petition for Writ of Certiorari is yet another chapter in a tone of harassing, vexatious and frivolous attempts (first com-

menced over twenty years ago in 1955) by Petitioner or his attorney to burden the courts with their disagreement with the philosophy that public service corporations have properly been granted by the State the power to take private property for a public purpose upon the payment of just compensation.

In 1955, plaintiff's attorney, S. L. Lewis, challenged the authority of Texas Power & Light Company, Respondent herein, to survey his land preparatory to its filing a condemnation action. The Texas Court of Civil Appeals affirmed an injunction granted by the trial court restraining Lewis from interfering with the survey. *Lewis v. Texas Power & Light Company*, 276 S.W. 2d 950 (Tex.Civ.App. 1955, error ref'd, n.r.e).

During the pendency in the state courts of the Lewis condemnation suit, referred to above and involving the same tract of land, S. L. Lewis, on behalf of his sister, brought an action in the United States District Court against Texas Power & Light Company and its parent company challenging the validity of the Texas condemnation laws. The 5th Circuit affirmed the trial court's dismissal of the action. *Baber v. Texas Utilities Company*, et al., 128 F.Supp. 753 (N.D.Tex. 1955), aff'd 5 Cir. F.2d 665 (1956).

In 1972, Petitioner's attorney, S. L. Lewis, instituted an action in the United States District Court against Texas Power & Light Company, its parent and associated companies, and substantially all other electric and gas utility companies in Texas, again attacking the validity of the Texas condemnation laws. The 5th Circuit affirmed the trial court's dismissal of the

action. *Lewis v. Texas Power & Light Company, et al.*, 5 Cir. 462 F.2d 1318 (1972).

While the above case, *Lewis v. Texas Power & Light Company*, was pending in the 5th Circuit and before its decision, Lewis filed in the U.S. Supreme Court his petition for Writ of Mandamus and in the alternative for Writ of Certiorari against the Chief Judge of the 5th Circuit and the trial judge, seeking reinstatement of the case on the trial docket. This Court denied the motion. *Lewis v. John R. Brown, Chief Judge, et al.*, 404 U.S. 891, 92 S.Ct. 74, 30 L. Ed. 119 (1971).

In 1972, Don Smart, represented by the same S. L. Lewis who instigated the previous actions, brought suit against Texas Power & Light Company and the Governor and Attorney General of Texas, again alleging the invalidity of the Texas condemnation laws in regard to a condemnation suit filed in Collin County, Texas, in 1970. The action of the trial court in dismissing the action was affirmed by the 5th Circuit. *Don M. Smart v. Texas Power & Light Company, et al*, 5 Cir., 525 F.2d 1209 (1976). From such action, plaintiff has recently petitioned for a Writ of Certiorari from this Court.

Later in 1972, Nancy Gayle Smart, wife of Don Smart, represented by S. L. Lewis, filed an action in the U. S. District Court against the Dallas County Sheriff and his deputies, a Dallas County District Attorney, the Dallas County Criminal Judge and the Rockwall County District Judge in whose Court the 1972 Don Smart condemnation proceeding was pending, alleging false arrest in connection with Smart's allegedly interfering with the service of process in the condemnation proceed-

ings. The 5th Circuit affirmed a judgment against the plaintiff. *Nancy Gayle Smart v. Jones,* 5 Cir., 493 F.2d 63 (1974), reh. den., 5 Cir., 495 F.2d 1372 (1974). This Court denied petition for Writ of Certiorari, 419 U.S. 1090, 95 S.Ct. 681, 42 L.Ed.2d 882 (1974), and denied petition for rehearing, 420 U.S. 939, 95 S.Ct. 1151, 43 .Ed.2d 417 (1975).

In 1973, Don Smart, represented by S. L. Lewis, brought a civil rights action in the U.S. District Court against the Dallas County Sheriff and his deputies, the District Attorney and his assistants, and Texas Power & Light Company and its president and its attorney, alleging the invalidity of the Texas condemnation laws and false arrest for allegedly interfering with the service of process upon him in the condemnation suit involved in the instant controversy in which he has petitioned this Court for a Writ of Certiorari. The trial court granted defendant's motion for summary judgment, and upon plaintiff's appeal, the 5th Circuit affirmed. *Don Smart v. Jones, et al,* 5 Cir., 530 F.2d 64 (1976). The instant proceeding involves Don Smart's petition to this Court for a Writ of Certiorari.

In 1974, Scott Smart, the brother of Don Smart, represented by S. L. Lewis, filed an action in the U.S. District Court against Texas Power & Light Company and its attorney and the District Judge of Collin County, Texas, in which the Don Smart condemnation suit was pending, alleging the invalidity of the Texas condemnation laws and that the Collin County proceedings were void because of his non-joinder as a party. The trial court dismissed the action because of Scott Smart's lack of standing by reason of his claim under a conveyance which was

unrecorded until 2½ years after commencement of the Collin County proceedings. The 5th Circuit affirmed the dismissal. *Scott Smart v. Texas Power & Light Company, et al,* 5 Cir., 525 F.2d 1211 (1976). From such action plaintiff has recently petitioned for a Writ of Certiorari from this Court.

Later in 1974, Nancy Gayle Smart, wife of Don Smart, represented by S. L. Lewis, filed an action in the U.S. District Court against Texas Power & Light Company and its president and attorney, alleging the invalidity of the Texas condemnation laws and deprivation of her constitutional rights, said action being based upon the same facts and occurrence as she had alleged in her previous action against the Dallas County Sheriff, et al. Defendants' motion to dismiss this action on the ground of *res judicata* and collateral estoppel is pending in the trial court. *Nancy Gayle Smart v. Texas Power & Light Company, et al,* No. CA3-74-870-F in the U.S. District Court for the Northern District of Texas, Dallas Division.

STATEMENT OF THE CASE

These three Respondents, Texas Power & Light Company, its President, J. F. Skelton, and one of its attorneys, Robert E. Burns, respectfully submit that Petitioner's "Statement of the Case" is inaccurate and misleading. The true facts are set forth in their Motion for Summary Judgment and an attached affidavit. (R. 226-234) Their Motion was based in part upon the ground that neither the facts nor allegations of Petitioner indicate that these Respondents had anything to do with Petitioner's arrest and jailing other than to file a Petition to condemn an electric utility right-of-way across Petitioner's (and others')

land and request that service of citation be made by the Sheriff's Department. The result is that as a matter of law these three Respondents were and are entitled to summary judgment herein, there being no genuine issue of a material fact herein. Succinctly, the true facts are these. (R.226-234)

In 1972 Respondent Burns, as attorney for Texas Power & Light Company (hereinafter called "Company"), prepared and filed a Petition in condemnation on behalf of Company to condemn an easement for an electric power line on land owned by Petitioner and others in Dallas County. The Petition and related papers were delivered to the Judge of the proper court in Dallas, and thereafter Respondent Burns mailed a letter to the Sheriff of Dallas County enclosing the pertinent papers and requesting that the Sheriff serve notices of hearing and copies of the Petition on the various defendants, including Petitioner. At that time neither Respondent Burns nor Respondent Company nor Respondent Skelton, who was the President of Company, were acquainted with the various members of the Sheriff's Department who were named by Petitioner in his Petition as defendants in this case.

In the subsequent efforts by the Sheriff's Department to secure service of Citation upon the defendants, neither Respondent Burns nor Respondent Skelton nor any representative of Respondent Company had any contact with the Petitioner nor any other landowner who was named as a defendant in the condemnation proceeding. Likewise, at no time during the above period did Respondent Burns, Respondent Skelton or any other representative of Respondent Company discuss with any other defendant-Respondent in this action the method of

service of notice on the Petitioner nor that he should be followed, stopped, arrested, jailed, reported, mugged, harassed, deprived of freedom nor deprived of any legal or constitutional right; and in fact there was no contact or conspiracy whatsoever between these three Respondents and the other defendants-Respondents.

Because the Sheriff in California reported that he was unable to secure timely service upon another defendant in the case, and because the electric power line needed to be built without delay, the condemnation hearing was cancelled by Respondent Burns, an agreement was worked out with an adjoining landowner to place the electric power line on his property, and the condemnation proceeding against the Petitioner and others was thereupon dismissed.

Therefore, as to these three Respondents, the undisputed facts show only that they filed an eminent domain proceeding, that service of the required notices upon the landowner-defendants was requested of the Sheriff's Department, that these three Respondents thereafter had no connection with any effort made to obtain such service, and yet the Petitioner filed suit against these Respondents for damages for his alleged improper arrest. As the Court can readily see from an examination of the Petition for Writ of Certiorari on file herein and the allegations in Petitioner's Original Complaint, these Respondents are entitled to judgment as a matter of law.

REASONS FOR DENYING THE WRIT

Entirely apart from any of the "Questions Presented" by Petitioner in his Petition for Writ of Certiorari, the bald fact

remains that the motion for summary judgment filed by these three Respondents in the trial court was, under the undisputed facts, the undisputed law and Petitioner's own factual allegations, properly granted by the trial court and properly upheld by the intermediate appellate court. These three Respondents (as well as all other Respondents, actually) never should have been subjected to participation in this suit.

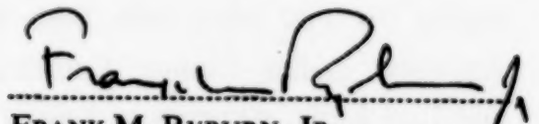
Likewise, as to Question No. 2 raised by Petitioner, i.e., that the Fifth Circuit Court of Appeals was confused in referring to its opinion in *Smart v. Texas Power & Light Co.*, 525 F.2d 1209 (5th Cir. 1976), an earlier case, Petitioner is in error again. The Court correctly referred to its earlier opinion in reaching the conclusion that Petitioner's contentions that condemnation proceedings were illegally instituted were all answered and refuted by its earlier opinion.

CONCLUSION

There is no merit to Petitioner's Petition for Writ of Certiorari any more than there was any merit to the contentions made in the series of cases described in the Preface, *supra*. The judgment of the courts below are correct and just.

WHEREFORE, Respondents pray this Honorable Court to deny a Writ of Certiorari in this case.

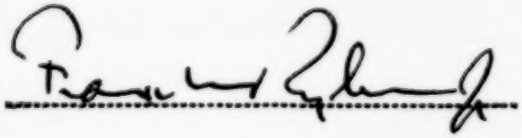
Respectfully submitted,



FRANK M. RYBURN, JR.
1511 Fidelity Union Life Bldg.
Dallas, Texas 75201
214/741-5811
Counsel for Respondents Texas Power & Light Company, J. F. Skelton and Robert E. Burns

CERTIFICATE OF SERVICE

I, Frank M. Ryburn, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing "Brief of Texas Power & Light Company, et al., Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit" by mailing three copies of same by United States Mail, postage prepaid, on September 14, 1976, to each, Mr. S. L. Lewis, 5614 Richmond Street, Dallas, Texas 75206, counsel of record for Petitioner, and John B. Tolle, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas 75202 and Earl Luna, Attorney at Law, 1002 Dallas Federal Savings Bldg., Dallas, Texas 75201, counsels for other Respondents.



In The

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-282

DR. DON M. SMART,

Petitioner,

v.

CLARENCE JONES, et al.,

Respondents.

BRIEF FOR RESPONDENTS ORVIS, JONES, GRANDSTAFF, BARRETT AND BARRETT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

EARL LUNA and
THOMAS V. MURTO III
1002 Dresser Building
1505 Elm Street
Dallas, Texas 75201

Attorneys for Respondents Orvis, Jones, Grandstaff, Barrett and Barrett.

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

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Other Authorities

In The

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Respondents.

BRIEF FOR RESPONDENTS ORVIS, JONES, GRANDSTAFF, BARRETT AND BARRETT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

Respondents Judge John J. Orvis, Sheriff Clarence Jones, and Deputy Sheriffs J. W. Grandstaff, Benny Barrett and Gail R. Barrett, respectfully submit this brief in opposition to the petition for a writ of certiorari of Dr. Don M. Smart.

QUESTIONS PRESENTED

1. Is a capias issued by a clerk of the court as authorized by Texas law a per se violation of the due process requirements of the United States Constitution?

2. Was the Petitioner denied constitutional due process by the Summary Judgment granted against him?

3. Is judicial immunity a denial of the due process and equal protection provisions of the Fifth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Respondents cannot agree with the Petitioner's Statement of the Case and feel the necessity of restating it.

This litigation arose out of incidents that transpired on September 11, 1972, when Respondent J. W. Grandstaff, a Deputy Sheriff, attempted to serve a notice of a commissioners' hearing on Petitioner Dr. Don M. Smart in condemnation proceedings initiated by Texas Power & Light Company. Dr. Smart attempted to prevent service of this notice by refusing to come to the door and subsequently attempting evasive action in the car he was driving. When Deputy Grandstaff followed him, Dr. Smart suddenly applied the brakes several times in an attempt to cause Deputy Grandstaff to crash into the rear of his car. Dr. Smart's efforts were assisted by his nurse, subsequently his wife, Nancy G. Smart, who followed Deputy Grandstaff. Together they attempted to position their cars so as to force Deputy Grandstaff off the road. Eventually these tactics succeeded and Dr. Smart eluded Deputy Grandstaff who requested the assistance of other law enforcement officials by radio. A police officer stopped and arrested Mrs. Smart. Deputies Benny Barrett (B. Barrett) and Gail Barrett (G. Barrett) arrived on the scene and took Mrs. Smart to the courthouse where she was taken before a magistrate and placed in jail.

Deputy Grandstaff made a report of the incident, which was

transmitted to the District Attorney's office. Assistant District Attorney Lem Brotherton took an affidavit from Grandstaff and filed an information charging Dr. Smart with aggravated assault. The case was filed in County Criminal Court No. 2 of Dallas County, Texas, Judge John J. Orvis presiding, and the clerk of the court issued a capias for Dr. Smart's arrest.

Deputies Grandstaff and B. Barrett proceeded back to Dr. Smart's office and arrested him under the authority of the capias. Deputy G. Barrett rode with the other deputies in order to return to her car, which she had parked when she assisted bringing Mrs. Smart to the courthouse. She did not participate in Dr. Smart's arrest. Dr. Smart was taken to the county jail where he was released on bail within four hours.

Dr. Smart's criminal case pended for several months in the Court of Judge John J. Orvis before Assistant District Attorney John Tolle filed a motion to dismiss, which was granted.

Dr. Smart brought the instant suit against the Respondents alleging that his civil rights had been violated and that he had been damaged in several respects, including the arrest of his later wife. While this suit was pending, his wife's civil rights case brought against the Sheriff and his deputies was decided adversely to her, which result was affirmed on appeal. *Smart v. Jones,* 493 F.2d 663 (5th Cir. cert. denied .... U.S. ...., 95 S.Ct. 681, rehearing denied .... U.S. ...., 95 S.Ct. 1151 (1975).

The instant suit was filed in the Northern District of Texas on September 13, 1973, and was assigned to Judge Eldon B. Mahon. In February, 1974, Judge Mahon dismissed Judge Orvis from the suit based upon *Pierson v. Ray,* 386 U.S. 547,

87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). On August 2, 1974, this cause, along with other cases on Judge Mahon's Dallas docket, was transferred to newly appointed Judge Robert W. Porter. Judge Porter, just prior to his appointment to the federal bench, served as co-counsel with the undersigned for various Dallas County officials in class-action civil rights suits. Judge Porter, therefore, had civil rights cases against Dallas County officials transferred to other judges of the Dallas Division. The instant cause was transferred to Judge W. M. Taylor's docket.

After extensive discovery, all parties to the suit moved for summary judgment and the district court, after a hearing in chambers and providing an extended time for parties to bring additional matters to its attention, granted a summary judgment against Dr. Smart. The Court of Appeals for the Fifth Circuit affirmed. *Smart v. Jones,* 530 F.2d 64 (5th Cir. 1976).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The Decision of the Court of Appeals Was In Accord With Applicable Decisions of This Court.

The Petitioner poses four separate issues in his petition for certiorari, but he actually attempts to justify a review by writ of certiorari under the considerations specified in Rule 19, Sup. Ct. Rules, only with respect to his issue of whether a Texas capias meets the constitutional due process requirements for an arrest warrant. Petitioner argues that a capias issued by a clerk in Texas fails to meet the due process requirements of the Constitution. While Petitioner cites three decisions of this Court, none of which are specifically in point, he fails to cite the controlling decision, *Shadwick v. City of Tampa,* 407 U.S. 345,

92 S.Ct. 2119, 32 L.Ed.2d 783 (1972). In *Shadwick* this Court held the issuance of arrest warrants by clerks of a court pursuant to local or state authority did not violate the Constitution if the clerk was independent of the prosecutor or the police. The Petitioner himself points out that the capias in the instant case was issued by a deputy clerk acting for the county clerk, who is an elected county official. Thus this issue concerning the constitutionality in the abstract of the authorization by Texas law for clerks to issue a capias has already been completely covered by *Shadwick v. City of Tampa,* supra.

The Petitioner also urges this Court to hold that judicial immunity to damage suits is a denial of due process and equal protection of the law under the Fifth and Fourteenth Amendments. The Petitioner pitches his argument on the basis that judicial immunity is an outdated self-serving legal principle which should be abolished in order to engender respect for the judiciary. He fails, however, to state just how judicial immunity violates either the due process or equal protection clauses of the Constitution. This Court has fully considered the applicability of the judicial immunity doctrine to civil rights acts suits in *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). The Petitioner raises no new substantial issues requiring a reconsideration. Indeed, the allegations of this very suit illustrate the continuing need of judicial immunity to prevent the harassment of the judiciary by dissatisfied parties.

2. The Decision of The Court of Appeals Does Not Call for An Exercise of the Supreme Court's Powers of Supervision.

The Petitioner initiated the instant suit alleging a conspiracy

among officers of Texas Power & Light Co. and Dallas County officials to wrongfully condemn a portion of his property and to falsely arrest, imprison and criminally prosecute him. Apparently he is now suggesting that the alleged conspiracy expanded to the federal district judge who granted summary judgment against him. The Petitioner's accusation that he was denied due process because the district judge did not recuse himself from the case is totally frivolous. The district judge who granted the summary judgment had been a member of the district attorney's staff forty years ago and also had been in a law firm associated with Respondent Burns, which firm represented Texas Power & Light Co. thirty years ago, but he had not been associated with any of the defendants for the past thirty years prior to the litigation. Such old associations unrelated to the instant suit do not meet the grounds for disqualifying a judge under 28 U.S.C. § 455.

The Petitioner further complained that the district court should not have granted summary judgment against him without having a full evidentiary hearing. Rule 56, Fed. R. Civ. P., does not call for a formal evidentiary hearing prior to the entry of a summary judgment. The informal conference in chambers with the district judge fully complies with the requirements of the Rule and did not hinder the Petitioner's opportunity to argue why summary judgment should be granted in his favor instead of the Respondents' favor. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

The Petitioner's argument that the district court should not have been able to take notice of Mrs. Smart's unsuccessful civil

rights action against four of the defendants in this suit arising out of the same set of circumstances is also meritless. Petitioner was counsel of record for his wife, had a financial stake in her claim of a loss of future earnings, which would have been community property in Texas, and sought damages for her arrest. The judge was entitled to consider that case as a means of eliminating possible fact issues.

The Court of Appeals' decision does not call for this Court's exercise of its supervisory power.

The decision below turns on its own rather unique facts and will affect few, if any, other litigants. No major pronouncements of law were made which should be considered by this Court. Instead this case concerned a mere application of settled law to its own facts.

Neither does the Petitioner establish that the opinion below conflicts with applicable state law on an important issue of state law. The case cited by Petitioner, *Burch v. City of San Antonio*, 518 S.W.2d 540 (Tex. 1975), concerns delegation of the condemnation power by a city, not the internal procedures of a corporation. Furthermore, the question of whether Texas Power & Light Co. followed the correct internal steps for filing a petition in condemnation is irrelevant to Petitioner's claims in the instant case of how his constitutional rights were allegedly violated.

The Petitioner has utterly failed to establish any special and important reason for granting a review on writ of certiorari in the instant cause.

CONCLUSION

For the reasons stated above, the Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Earl Luna

Thomas V. Murto III

EARL LUNA and
THOMAS V. MURTO III
1002 Dresser Building
1505 Elm Street
Dallas, Texas 75201

Attorneys for Respondents Orvis, Jones, Grandstaff, Barrett and Barrett.

PROOF OF SERVICE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court

of the United States and am one of the attorneys of record for Respondents Orvis, Jones, Grandstaff, Barrett and Barrett herein.

I further state upon oath that upon the 11 day of September, 1976, I served 3 copies of the foregoing Brief of Respondents Orvis, Jones, Grandstaff, Barrett and Barrett, in Opposition to Granting Writ of Certiorari on S. L. Lewis and Dr. Don M. Smart, Room 101, 10611 Garland Road, Dallas, Texas 75218, Counsel for Petitioner; Mr. Alan Wilson, 1200 One Main Place, Dallas, Texas 75250, Counsel for Respondent Fidelity and Deposit Company; John B. Tolle, Dallas County Courthouse, Dallas, Texas 75202, Counsel for Respondents Wade, Tolle and Brotherton; and Robert E. Burns, 1511 Fidelity Union Life Building, Dallas, Texas 75201, Counsel for Respondents Skelton, Burns and Texas Power & Light Co., by depositing the same in the United States Mail, with first class postage prepaid.

Earl Luna

SUBSCRIBED AND SWORN TO before me by the said EARL LUNA, this the 11 day of September, 1976.

Notary Public, Dallas County, Texas

In The

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-282

DR. DON M. SMART,

Petitioner,

v.

CLARENCE JONES, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

HENRY WADE
Criminal District Attorney
Dallas County, Texas
JOHN B. TOLLE
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202
(214) 749-8511
Attorneys for Respondents Wade, Tolle and Brotherton

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This Brief in opposition to the petition for certiorari is respectfully submitted on behalf of the respondents Henry Wade, Criminal District Attorney for Dallas County, Texas, and Lem Brotherton and John Tolle, Assistant District Attorneys.

STATEMENT OF THE CASE

Petitioner's statement of the case is replete with serious, material misstatements and omissions, and thus is badly misleading. We therefore here restate the case and its facts.

The cause arose as a complaint by Don M. Smart against ten individual defendants and one corporate defendant for

numerous alleged violations of his civil rights. Don Smart's complaint against the respondents Wade, Tolle and Brotherton alleged that they, as prosecuting attorneys, accepted a criminal complaint and filed a criminal charge against him without adequate investigation, insisted upon the prosecution of same, and undertook the representation of the Sheriff and his deputies in the Civil Rights suit filed by Nancy Gayle Smart, Don Smart's wife.

The respondents Wade, Tolle and Brotherton filed their motion for summary judgment, supported by the depositions of themselves and all other parties (except for Judge Orvis who had been dismissed as a party) on November 27, 1974. The Court heard arguments on the motion on December 19, 1974. Summary judgment was entered in favor of all respondents on May 30, 1975.

STATEMENT OF THE FACTS

This litigation arose from the same fact situation which this Court has earlier considered in the case of *Nancy Gayle Smart v. Jones, et al.*, 493 F.2d 633, reh. den. 495 F.2d 1372; certiorari denied 41 US 1090, reh. den. 420 US 939 (1975).

On September 11, 1972, Deputy Sheriff Grandstaff went to the residence of Don Smart to serve Don Smart with a notice of a condemnation hearing. There he encountered Nancy Gayle Smart, to whom he announced his identity and purpose. She went into the house and came out in a few minutes with Don Smart, and they engaged in an apparent conversation in the driveway. Then Don Smart got into one of the cars parked in the driveway and drove across the lawn to get around Grand-

staff's car, which was still parked in the driveway (Don Smart's residence was a thirty-five acre estate, and the driveway was approximately one quarter of a mile in length). Grandstaff followed in his car, intending to serve the condemnation notice. During the course of the drive, Don Smart repeatedly hit his brakes in what Grandstaff perceived to be an attempt to cause Grandstaff's car to ram the rear of the car driven by Don Smart. Meanwhile, Nancy Gayle Smart had followed in another car. During the course of the drive along the public streets of Dallas, Don Smart and Nancy Gayle Smart, acting in concert, maneuvered their cars in such a way that Nancy Gayle Smart was able to force Grandstaff's car to the curb. Just as she did so, Don Smart changed lanes, stopped, backed up beside Grandstaff's car, went down a side street, and fled the scene. Grandstaff radioed for assistance over his police radio, and other officers arrested Nancy Gayle Smart a few moments and a few blocks from the scene.

Grandstaff made a report of the facts concerning the incident and presented it to the respondent Lem Brotherton, the assistant dsitrict attorney charged with the duty of processing complaints by law enforcement agencies. Brotherton took Grandstaff's affidavit, and based upon his representations, filed an information charging Don Smart with the misdemeanor offense of aggravated assault. The information was filed in County Criminal Court No. 2 of Dallas County. Based upon Grandstaff's affidavit and the information filed, the Clerk of the Court issued a capias for Don Smart's arrest, and he was later arrested under its authority.

Respondent Tolle's connection with the case was in his ca-

pacity as assistant district attorney representing the State on a motions hearing and on a few docket settings. He later filed a motion to dismiss the criminal charge against Don Smart, and the charge was dismissed five months before Don Smart filed the instant Civil Rights case. Respondent Wade had no active part in the criminal case against Don Smart.

ARGUMENT

I.

SUMMARY JUDGMENT WAS PROPERLY RENDERED IN FAVOR OF THESE RESPONDENTS.

The pleadings and depositions before the District Court showed without contradiction that these respondents acted at all times within the scope of their duties as prosecuting attorneys in initiating and pursuing the criminal prosecution against Don Smart, and summary judgment in their favor was proper. *Imbler v. Pachtman,* .... US ... , 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

CONCLUSION

For the reason stated above, respondents pray that the writ be denied.

Respectfully submitted,

HENRY WADE
Criminal District Attorney
Dallas County, Texas

JOHN B. TOLLE
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202
(214) 749-8511
Attorneys for Respondents Wade, Tolle and Brotherton

CERTIFICATE OF SERVICE

I, John B. Tolle, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served copies of the foregoing Brief in Opposition to Petition for Certiorari on counsel for Petitioner, by depositing the same in the United States Mail, first-class postage prepaid, on this the 17 day of September, 1976, addressed to S. L. Lewis, Esq., 5614 Richmond Street, Dallas, Texas, 75206, and to Don M. Smart, 10611 Garland Road, Dallas, Texas, 75218, as counsel of record for Petitioner, and to Earl Luna, 1002 Dresser Bldg., 1505 Elm Street, Dallas, Texas, 75201, and to Frank M. Ryburn, Jr., 1511 Fidelity Union Life Bldg., 75201, as counsel of record for other respondents.

John B. Tolle